No. 3552

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF
THE CRAIG LUMBER COMPANY,
a Corporation,
Bankrupt.

E. L. COBB, as Trustee of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt, and BANK OF ALASKA, a Corporation,
Appellants,

vs.

HILLS-CORBET COMPANY, a Co-partnership, composed of F. R. HILLS and W. W. CORBET,
Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLEES

CASSIUS E. GATES,
FRANK P. HELSELL,
NEWARK L. BURTON,
Attorneys for Appellees.

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STATEMENT OF THE CASE.

Because of certain serious but inadvertent misstatements in appellants' brief, we will recite the facts of this case as we understand them:

Hills-Corbet Company, appellees, on October 31st, 1917, entered into a written contract with Craig Lumber Company, the present bankrupt, by which Hills-Corbet Company agreed to furnish and install in the mill of the Lumber Company at Craig, Alaska, certain described pieces of saw mill machinery (For contract, see Transcript, p. 5). The Hills-Corbet Company agreed to install machinery, put on belting, install piping and turn over mill ready to run according to attached drawings and specifications. The Lumber Company agreed to pay the Hills-Corbet Company actual cost of all labor, equipment and building material used in connection with the work, the cost of insurance and all costs except freight and transportation charges of men and material from Seattle, Washington, to Craig, Alaska, plus ten per cent. The Lumber Company agreed to furnish all wood building material and to pay the freight and all transportation charges of material and men from Seattle, Washington, to Craig, Alaska. And the cost of the machinery was to be cost, f. o. b. ship's tackle, Seattle, Washington, plus fifteen per cent to cover the operation expenses of the company. The cost of labor was to be actual cost to the company. Fifty per cent of cost of all material and machinery was to be paid upon presentation of invoices,

twenty-five per cent in forty days and balance thirty days from completion of contract. The Lumber Company agreed to pay labor charges in full every month and the ten per cent on labor should not be paid until thirty days after completion of the contract.

The Hills-Corbet Company shipped machinery and other materials to Craig, Alaska, in compliance with this contract, the total value of which at the contract price was $31,708.49 (Transcript, p. 82).

During the period of shipment, Mr. Tromble, manager of the Lumber Company, requested Hills-Corbet Company to purchase and ship certain items which had no connection with the contract, for example, track, mattresses, double-deck steel bunks and boom chains. The total bill for extra material and machinery was $5,958.79 (Transcript, pp. 84, 76; Testimony of Mr. Corbet, pp. 98-105). This item includes the amount of invoice No. 279 for $1,614.63 which was a second shipment of fire brick and other material (Transcript, p. 30). The first shipment was unloaded upon the dock of the Lumber Company at Craig; and, because of flimsy construction, the whole dock collapsed and the material was lost in the sea. The Lumber Company recognized that the fault was theirs; and, in reordering

it, asked Hills-Corbet Company to waive their profit, which was done (See Plaintiff's Exhibit "E"; Testimony of Cloudy, Transcript, pp. 130, 131).

Hills-Corbet Company hired F. A. Cloudy to go to Alaska and install the machinery. He took with him a crew of men to do that work. By the terms of the agreement, the Lumber Company was to drive all piles, furnish all lumber, and Hills-Corbet Company was only to build certain buildings above foundations. Yet, when Cloudy reached there, he found no work had been done by the Lumber Company to prepare the mill for the Hills-Corbet work. No lumber was cut; no foundations were in; and, at the request of Mr. Tromble, manager of the Lumber Company, Cloudy, with Hills-Corbet men, did all of this preliminary work (Transcript, p. 123).

In addition, Mr. Tromble ordered many changes and additions to the work covered by the contract. He ordered a new roof over the whole mill, the bunk house reconstructed, excavating for mud sills, overhauling the carriage, raising a beam over the carriage, building a pipe-line to the cook house, building a log-slip from the pond (Transcript, pp. 123-130).

Mr. Cloudy kept a strict account of the time put in on the various kinds of extra labor and marked it in his time book (See Exhibits "J" and "K"); and from these Mr. Corbet computed the amount of extra labor not on contract done by Hills-Corbet men, totaling $3,098.24 (See Exhibit "O").

Shortly after Mr. Cloudy reached Craig, Mr. Tromble, the manager of the Lumber Company, left and turned over to Mr. Cloudy all the affairs of the Lumber Company. Cloudy ran the cook house, bought provisions for the cook, bossed the employes of the Lumber Company clearing land (Transcript, pp. 145 and 155). In fact, he left Cloudy to occupy a dual capacity. He was acting as agent of the Hills-Corbet Company to install the machinery and as general manager of the mill besides. For it will be understood that the mill had been in operation before the date of our contract. We were simply making additions and improvements to the mill.

When Tromble, the manager, left, he made no provision to take care of the payroll of the workmen. Cloudy was in a quandary as to how the men would be paid. He made a special trip to Wrangell to call upon the cashier of the Bank of Alaska,

which was financing the Craig Lumber Company. Cloudy found that no provision had been made to meet the monthly payroll (Transcript, pp. 139-140). Cloudy told the banker he would have to have the money or his crew would quit. Finally the banker advanced $3,500.00, and had Cloudy sign a check in that sum, payable to Hills-Corbet Company and signed Craig Lumber Company, per F. A. Cloudy (See Exhibit No. 1; Transcript, p. 237).

From the first, all money disbursed by Cloudy was carried in the account of the Hills-Corbet Company. Three checks, including the one just mentioned, each in the sum of $3,500.00, were passed to the credit of Hills-Corbet Company account. After this sum was disbursed, the bank paid all overdrafts when signed by Cloudy. Out of this one banking account, Cloudy paid the bills of the Craig Lumber Company of all kinds. Some of his checks paid Hills-Corbet men, some paid Craig Lumber Company men, some paid for cook-house supplies and cook and bunk-house wages. When he drew a check to pay Hills-Corbet Company men, he marked it "on contract." When he paid the other bills unconnected with the mill, he marked them "not on contract" (Transcript, pp. 144-149). Cloudy marked all checks payable to Hills-Corbet men "on contract," regardless of whether the work

actually done was in fact extra or not. He did this because he thought Hills-Corbet Company would be entitled to ten per cent on such labor (Transcript, p. 148).

A careful addition of all checks marked "on contract" and written by Cloudy will show a total of $11,410.82. This was in payment of the total time of all Hills-Corbet men, whether expended on extra work or not. Then, to determine the amount of work done by Hills-Corbet Company under the contract, we must subtract the sum of $3,098.24, extra labor done by these men outside of the contract, and we find that the total labor cost of the work which Hills-Corbet Company undertook to perform in the contract is $8,312.58. This is the amount of labor pay roll which Craig Lumber Company is entitled to charge to Hills-Corbet Company. And the court so found (Transcript, pp. 77 and 85).

And to find out what was due and unpaid to Hills-Corbet Company, the court struck a balance as follows:

DEBITS.

Invoices under contract	$31,708.49
10% on labor	831.25
Total	$32,539.74

But contract price is limited to $32,125.00, so we must limit total debits to that sum. Add to $32,-125.00 extras in the sum of $5,958.79 and we get a total of $38,083.79 in debits.

CREDITS.

Payments	$19,943.82
Labor paid by Craig Lumber Co.	8,312.58
Total credits	$28,256.40
Balance due	$ 9,827.39

Appellants, in their brief, insist that the Craig Lumber Company has paid to Hills-Corbet Company over $39,000.00. But, in making such a contention, they entirely ignore all of the testimony in the case. They produced no testimony which even tended to contradict the testimony of F. A. Cloudy —and he carefully and fully explained his expenditures—and our statement of facts is simply a summary of what he said. His testimony—in fact all of our testimony—stands wholly uncontradicted in the record; and it is not remarkable that the court should have believed it.

The petition of Hills-Corbet Company filed in this cause prayed for an order directing the trustee to return the machinery delivered to the bankrupt and as yet unpaid for. The trustee answered, setting up a mortgage to the Bank of Alaska on

certain real estate, and claiming that the machinery delivered by us had become fixtures and that the rights of the Bank were superior to the rights of the Hills-Corbet Company. The trustee and the Bank of Alaska, the mortgagee, were anxious to sell the mill site, all buildings including the mill and machinery, and, to give good title, must dispose of this litigation. And so it was stipulated by all parties, including the Bank who appeared in this action, that the Bank should sell the machinery in litigation and should file a bond conditioned to pay the balance of the purchase-price due to Hills-Corbet Company under the contract, in case the court should hold the title of Hills-Corbet Company superior to the rights of the Bank (See stipulation, Transcript, p. 65). The stipulation requires the filing of a bond, and provides:

> "Said bond shall contain a provision that judgment thereon may be rendered by said court or courts upon the determination of the controversy herein referred to."

And a bond in the penal sum of $12,000.00 was filed, conditioned as provided for in the stipulation, and contained this clause:

> "In case the United States District Court for the Territory of Alaska, Division No. 1, or an Appellate Court on appeal or review, shall sustain the rights of Hills-Corbet Com-

> pany, judgment may be entered by said court, or courts, directly against the bond and the parties thereto for the amount found due Hills-Corbet Company as set forth above."

And so, when the court sustained the rights of the Hills-Corbet Company, judgment was entered in accordance with the stipulation and bond against the Bank of Alaska. The court declined to render judgment against the surety on the bond.

ARGUMENT.

Appellant first argues that the contract between Hills-Corbet Company and the Lumber Company is not a contract of conditional sale. The contract expressly provides:

> "The title to the apparatus and material herein agreed to be sold shall not pass from the Company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments, the Company may re-take the property agreed to be sold."

In another place it is provided:

> "The purchaser agrees to properly care for all apparatus and material delivered until the same is fully paid for."

It seems hardly necessary to cite authority to support the fundamental proposition that parties may agree as to when title shall pass, and that their agreement will be followed and enforced by the

courts. That title was retained could not be more clearly expressed:

In 24 R. C. L., Sec. 743, p. 444, it is said:

> "If the contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the price, this stipulation is perfectly lawful; and effect will, as a general rule, be given thereto and the contract upheld as a conditional sale contract, under which no title will pass to the buyer until the condition is performed."

See *Harkness vs. Russell,* 118 U. S. 663.

In *Bailey vs. Baker Ice Machine Co.,* 239 U. S. 268, it appeared that the Ice Machine Company, by contract in writing, agreed to deliver and install for Grant Bros., at Horton, Kansas, an ice-making and refrigerating machine, to be paid partly in cash and partly in deferred installments, evidenced by interest-bearing notes. It was specially stipulated that the title to the machine should be and remain in the Baker Company until full payment of the purchase price; that Grant Bros. should keep the machine in good order and insured. The trustee in bankruptcy contended that the contract was one of absolute sale with mortgage back.

The court held the contract one of conditional sale.

In *Bierce vs. Hutchins,* 205 U. S. 340, even where vendor took notes and collateral in addition to reserving title, the contract was upheld as a conditional sale contract. The court said:

> "The contract says, in terms, that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful."

Acceptance of notes for balance of purchase-price is not conclusive evidence that the sale was absolute.

Shook vs. Levi, 240 Fed. 121-123.

In *Southern Hardware & Supply Co. vs. Clark,* 201 Fed., p. 1, it was held that a contract whereby appellant delivered an automobile to the bankrupt and reserved title was a conditional sale although bankrupt was to sell with consent of appellant. There was an express retention of title by the seller until the buyer pays for the property.

> "When the buyer is, by the contract, bound to do something as a condition precedent to the passing of the title to the property, the title will not pass till the condition is fulfilled, although the property is delivered into the possession of the buyer. The buyer, in such case, acquires no property in the thing bought. He is only a bailee for a specific purpose."

The Hills-Corbet Company paid for the machinery with its own money. It gave the Lumber Company the benefit of its credit and agreed to wait for its money until the contract was finished. The Hills-Corbet Company bought the machinery in its own name. It was a contractor in every sense of the word. It guaranteed the price. It reserved the title by express agreement, and yet appellants contend that we were the mere agent of the Lumber Company, and, when we bought machinery with our own money and in our own name, the title to the property immediately vested in the Lumber Company. The argument ignores, not only the real relationship of the parties, but the express agreement between them. And to state the contention is enough to refute it.

Counsel finds some comfort in the conduct of the parties when certain fire brick were lost by the collapse of the dock. They say in their brief: "No question is raised by either party as to whose goods were lost." That is literally true. The ownership was not discussed. The Lumber Company did clearly assume the loss because its dock was defectively built. So the incident throws no light upon the question of title.

Again, it is insisted that Mr. Corbet made no objections to the Lumber Company not living up

to the terms of the contract. Appellants only quote that testimony which pleases them. Mr. Cobb, on cross-examination of Mr. Corbet, asked this question:

> "Q. Did you make any objection to their not living strictly up to the terms of the contract at that time?"
>
> "A. Yes, we certainly did."

Appellants cite *Herryford vs. Davis,* 102 U. S. 235. In that case, the contract provided for the sale to the Railway Company of certain cars and contained a stipulation that, if the purchase price of the cars was not paid, the vendor might take the property back, offer the same for sale, and, if there was any balance remaining after the payment of the purchase-price notes, it should go to the Railway Company. The court, of course, held that this contract was, in effect, a mortgage.

Appellants cite *Chicago Railway, etc., Company vs. Merchants Bank,* 136 U. S. 268. In that case, the court had for consideration the question whether certain notes given for the purchase price of railway cars were negotiable. The notes contained a provision reserving title, but also provided that they should be equally and ratably secured on said cars. The court held that the agreement con-

tained in the note was more nearly a mortgage than conditional sale because of the peculiar clause which we have mentioned.

The case of *Forsman vs. Mace,* 35 So. 372, is cited by appellants. In that case was involved a contract for the sale of a logging contract and a logging outfit for one lump price. It was conceded that there had been an out-and-out sale of the contract, and, for that reason, the court held that the title passed.

Appellants cite *Tompkins Co. vs. Monticello Cotton Oil Co.,* 137 Federal 625. In that case, the contract provided for the sale of certain machinery and included a stipulation that, if the purchase price was not paid, the vendor should take possession of the property, offer it at public or private sale, and pay any surplus resulting from such sale to the conditional vendee. There was also a provision for a deficiency judgment; and the court very correctly held that all of these provisions made the contract an equitable mortgage.

And so the court can readily see that, in all of the cases cited by appellant, there was some peculiar provision which made the court conclude that the contract, taken as a whole, constituted a mortgage. The contract involved in this case con-

tains none of the provisions which are mentioned in the cases cited by appellant, and there is nothing in the contract to indicate anything but a clear intention to reserve title and ownership until all sums due were paid.

THE RIGHTS OF THE TRUSTEE.

In the answer filed by the trustee (Transcript, p. 59), and on the trial, the rights of the Bank of Alaska under an alleged real estate mortgage were asserted, and it was alleged that the Bank took its mortgage without notice. It seems now, from the brief of appellant and from the absence of any proof of the mortgage or its foreclosure in the record, that this position has been definitely abandoned.

But the trustee insists that he is in the position of a creditor with a lien. It is conceded that, since the amendment of 1910, the trustee in bankruptcy has the rights of an attaching creditor. And yet an attaching creditor can have no rights superior to those of appellees. It has been consistently held that, since the amendment of 1910, the trustee does not hold the position of an innocent purchaser for value and without notice.

See *In re Lane Lumber Co.,* 217 Fed. 550 (9th Cir.), where the court considered the statute of

Idaho, which allows a vendor's lien for the unpaid purchase price of land except as against a purchaser or incumbrancer in good faith and for value. The court was considering the validity of a claim to an unrecorded vendor's lien as against the trustee in bankruptcy; and, referring to the amendment of 1910, said:

> "The amendment, in other words, was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate, which may be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. * * * It goes no further. It does not affect the character of the trustee's title as such. That is defined in Section 70 of the act, which clothes the trustee only 'with the title of the bankrupt as of the date he was adjudged a bankrupt.' "

And at another point the court said:

> "A creditor, 'holding a lien by legal or equitable proceedings' is not 'a purchaser or incumbrancer in good faith and for value.' * * * and, under the terms of the Idaho statute, the lien there given must give way only as to one of the latter class."

In 24 R. C. L., p. 455, it is said:

> "And, in the absence of statutory provisions to the contrary, it is generally held that the reservation of title in the seller is valid against levying creditors of the buyer, and even as against *bona fide* purchasers for value,

without notice of the buyer's want of title." See:

Note 25, L. R. A. N. S., 782.

Note 12, L. R. A., 703.

Note 1913 C. Ann. Cases, p. 330.

Sumner vs. Woods (Ala.) 42 Am. Rep. 104 and note.

Singer Mfg. Co. vs. Graham (Ore.) 34 Am. Rep. 572.

In *Pacific State Bank vs. Coats,* 205 Fed. 618, the court held a mortgage defectively acknowledged invalid as to personal property, but held it to be a valid equitable lien as to real estate except as to innocent purchasers for value. The court said:

> "That the trustee's rights were no higher than those of a creditor holding a lien by legal or equitable proceedings and were not equivalent to the rights of an innocent purchaser for value."

See also:

Zartman vs. First National Bank, 216 U. S. 134; 54 L. ed. 418.

Appellants merely suggest and do not discuss the question whether the machinery became so affixed to realty as to become fixtures. The court found

> "that all the machinery, etc., were so attached to the buildings by bolts and screws as to be

> easily moved from the said mill without damaging the building in any way whatsoever."

(Transcript, p. 75; Finding No. IX; see also testimony of Cloudy, pp. 184 to 186). So it is shown that the machinery did not become fixtures.

In *Meyer vs. Pacific Machinery Co.,* 244 Fed. 730 (9th Cir.), plaintiff sold saw-mill machinery to the Oregon City Co. and reserved title. The defendant bought the property from an assignee for the benefit of creditors. Plaintiff brought the action to recover the property. The court said:

> "But the evidence shows that the machinery is attached only by bolts and screws, that it can be removed without injury to the structure, and that it is not a fixture within the meaning of the law."

In *Whitney Central Trust, etc., Bank vs. Luck,* 231 Fed. 431, the court construed a statute which gave a lien on movable property for the unpaid purchase-price over other creditors. The court said:

> "The vendor's privilege here provided for continues to exist though the thing sold has been incorporated into a building or other immovable, if it can be detached or removed without injury to the soil or structure."

In *Lawton Pressed Brick, etc., Co. vs. Ross Kellar, etc., Co.,* (Okl) 124 Pac. 43; 49 L. R. A. N. S. 395, the plaintiff brought suit in replevin to regain

machinery installed in the mill. The defendant was a purchaser without notice of the reservation of title in the plaintiff. The court refers to the general rule that the sale and delivery of personal property on condition that the title shall remain in the vendor until the purchase price is paid does not pass title until the condition is complied with. The court said:

> "And in case the condition is not complied with, the vendor has the right to repossess himself of the goods, both against the vendee and his creditors, and, if guilty of no negligence, may recover the goods so sold, even from an innocent purchaser."

It is not seriously contended that the Craig Lumber Company could question our right to remove the machinery on the ground that the same had become attached to the realty. Under some authorities, a subsequent mortgagee, taking an interest in the real estate without notice and in good faith, might question the right to remove property which has become firmly affixed to the realty. But in this case, it appears affirmatively that the Craig Lumber Company—and therefore the trustee in bankruptcy—has never had any title to the land upon which the mill is situated. It is located upon land within a United States Forest Reservation, and the land is occupied merely under a permit

issued by the Forestry Service (see Findings of Fact No. IX; Transcript, p. 75; Testimony of Cloudy, Transcript, p. 210; Admission of Mr. Cobb and Mr. Marshall, p. 212). Having acquired no interest in the real estate, it is difficult to understand how the question of fixtures is involved. The trustee's interest in the mill and the machinery is no more than an interest or equity in personalty.

In *Detroit Steel Cooperage Co. vs. Sisterville Brewing Co.,* 233 U. S. 712; 58 L. Ed. 1166, the plaintiff sold tanks, fixtures and fittings to the defendant brewing company on conditional sale contract, reserving title in itself. It sought to enjoin the sale of the property under prior mortgage covering after-acquired property. The tanks were essential to the working of the brewery; and, after they were installed, the opening into the recess in which they stood was bricked up. The court said:

> "The common law knows no objection to what commonly is called a conditional sale."

And again:

> "But unless we give a mystic importance to bolts and screws, the mere knowledge that the chattel will be attached to the freehold is of no importance, except perhaps as against

innocent purchasers for value before the sale was recorded, which the mortgagees were not."

In *Holt vs. Henley,* 232 U. S. 637; 58 L. Ed. 767, a petition was filed to remove an automatic sprinkler system from the premises of the bankrupt, pursuant to a contract of conditional sale reserving title. The contract had not been filed as required by the laws of Virginia. The court referred to the amendment of 1910, but declined to give it a retroactive effect, and, referring to the question of fixtures, said:

> "The system was attached to the freehold; but it could be removed without any serious harm for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws."

In *Myrick vs. Liquid Carbonic Co.* (Ga.) 73 S. E.; 7-38 L. R. A.; N. S. 554, it was held that conditional vendor may recover machinery sold to bankrupt with reservation of title, although defendant has purchased the same from trustee in bankruptcy—free of liens. Property never became property of bankrupt, and trustee never acquired a title thereto. Plaintiff never asserted its title to

the property while it was in hands of trustee and never estopped itself by its conduct from so doing.

See also

Ratchford vs. Cayuga County, etc., Co. (N. Y.), 112 N. E. 447, 1916. L. R. A. 615.

Davis vs. Bliss (N. Y.) 79 N. E. 851; 10 L. R. A. N. S. 458.

Appellant cites *Washburn vs. Inter Mountain Mining Co.,* 109 Pac. 382. That case simply adheres to the principle that a party, dealing with realty after property has become a fixture and without notice of a conditional sale contract, takes a right superior to the reserved title of the conditional vendor. But, in this case, it appears affirmatively that the machinery did not become fixtures in any true sense of the term, and that there is no one who has acquired an interest in the realty subsequent to the installation of the machinery and who could be deemed an innocent purchaser without notice.

APPLICATION OF PAYMENTS.

The total cash payments made to Hills-Corbet Company were $19,943.82 (See Transcript, p. 44). Since there was a bill of extras amounting to $5,958.79, it is important to inquire how many of

these payments were or should be applied toward the payment of the extras.

First, we ascertain how many of the payments were applied by the debtor in payment of extras:

The payment of $3,812.23 made on December 17, 1917, included payment of the fares of the men to Craig, Alaska, in the sum of $477.36 (See Exhibit "E"). This was an extra (See Amended Bill of Particulars, Transcript, p. 45). The second shipment of brick, $1,614.63, was an extra. The Craig Lumber Company stood this loss, and made payment in full for same in their check for $4,461.63 (See testimony of Corbet, Transcript, p. 108). The Company paid one hundred per cent of the invoice for brick, recognizing that it was an extra. The check for $361.45, of March 5th, was in payment in full of extras shown by invoice 296 and 305 (Transcript, pp. 36 and 37), amounting to $333.00 (Exhibit "H"). So the debtor himself paid directly invoices for extras in the total sum of $2,424.99.

The last three payments made in the sum of $5,000.00 on March 18, $1,000.00 on July 19 and $1,000.00 on December 8th, were made without application by the debtor. They were simply lump-sum payments on the account of the debtor. The

Craig Lumber Company gave no directions as to application of these payments; the creditor carried all items in one account; and so it became the duty of the court to direct the manner in which these payments, amounting to $7,000.00, should be applied. And the court has followed the well-established rule of law that, where the debtor fails to make application of the payments and the creditor does not do so, then the court will apply the payments to the debt which is least secure. This rule is especially applicable here, because the amounts due under the contract were only payable in deferred installments, whereas the extras were due and payable at once.

Where the debtor has not directed the manner in which his payment should be applied and the creditor has not applied them to any particular debt, it becomes the duty of the court to apply the payments. According to the best and more numerous authorities, where there is a secured and an unsecured indebtedness, under these circumstances the court will apply the payments towards the payment of the unsecured indebtedness.

In 21 Ruling Case Law, p. 100, Sec. 107, it is said:

> "The rule that the court, in applying a general payment, should make the application

in the manner most beneficial to the debtor has not met with universal approval. On the contrary, there are a great many jurisdictions in which the doctrine prevails that the court, in applying a general payment, will do so in a manner most beneficial to the creditor * * *." In 30 Cyc. 1246, it is said:

"While in those states where the civil law rule has been adopted, the court will apply a payment to a secured rather than an unsecured debt, the general rule outside of such jurisdiction is that it will be appropriated to the unsecured indebtedness."

In *Field vs. Holland,* 6 Cranch. (U. S.) 8; 3 U. S. L. Ed. 136, the action was to set aside a sheriff's conveyance upon the ground that the judgments upon which execution issued had been satisfied. The question arose as to how certain payments by the judgment debtor should be applied, that is, whether upon the judgments or upon an unsecured indebtedness.

Chief Justice Marshall said:

"The principle, that a debtor may control, at will, the application of his payments, is not controverted. Neither is it denied, that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither the credtior or the debtor, it becomes the duty of the court; and in its performance, a sound discretion is to be exercised.

"It is contended by the plaintiffs, that, if the payments have been applied by neither the

creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In an exhaustive note on this subject, in 96 Am. St. Rep., p. 56, it is said:

"So where one debt is secured and the other is not, or, both being secured, one is more precarious than the other, it will generally be imputed by law to the unsecured or precarious debt."

In *Bell vs. Bell* (Ala.) 56 So. 926; 37 L. R. A. N. S. 1203, the court adopted the following rule as to the application of payments:

"But if neither the debtor nor creditor expresses an election, 'the presumption of the law is that the credit is applied most beneficially to the creditor; that is, to the most precarious debt, or the one least secured.' "

The Supreme Court of Iowa, in *Cain vs. Vogt,* 116 N. W. 786, adheres to this rule of law in the following language (p. 787):

> "Indeed, where but one of the debts are secured, and payments are made of which neither the creditor nor the debtor makes application, the court, under the rule prevailing in this state, will apply it to the reduction of the unsecured claim."

In *U. S. F. & G. Co. vs. State* (Kan.) 106 Pac. 1040; 26 L. R. A. N. S. 865, the court instructed the jury, in substance, that where a debtor owes debts, some secured and some unsecured, and makes payments without specifying what debts he intends to pay, the law will apply the payments on the unsecured debts. Also that the foregoing rule took precedence over the general rule that the first credit item extinguishes the first debit item. The court, referring to this rule, said:

> "It seems to be the one applied by all courts, except in a few states, where the civil law rule has been adopted."

In *Lee vs. Manley* (N. C.) 70 S. E. 385, the court said that a debtor has the right to direct the application of a payment. If debtor does not exercise this right, the creditor may apply the payment to either debt, and he is not restricted to the time the payment is made; and the court said:

"If neither the debtor nor the creditor makes the application, the law applies to the unsecured debt."

In *Wardlaw vs. Troy Oil Mills* (S. C.) 54 S. E. 658, the court follows the same rule, and says that the general rule about applying credits to oldest items will not be followed to exclusion of first rule above mentioned.

The same rule was adopted in Vermont in *Putnam vs. Russell,* 17 Vt. 54; 42 Am. Dec. 478, where the court said:

"The court will direct the application to those debts which have the poorest security." In a note in 12 L. R. A. 712, it is said:

"The Supreme Court of the United States, in a series of well-considered decisions, has reached conclusions quite in harmony with the current of English adjudication; and, upon both principle and authority, it is held that the debtor or the party paying money, may, if he so elect, direct its appropriation; but, if he fails to give such direction, this right of appropriation devolves upon the creditor. Should he fail to apply the fund in liquidation of some particular debt, the law will make the application according to the equities of the case. It should be added that, after a litigation has arisen, neither party is at liberty to apply the payments, but the court will, in furtherance of justice, order the amount credited upon that debt for which the security is the most precarious."

In *Barbee vs. Morris* (Ill.), 77 N. E. 589, where plaintiff furnished some materials for which he could claim no lien and defendant made him a general payment without directing where it should be applied, the court held that equity will credit the payment according to its own view of the intrinsic justice and equity of the case, so as to give the creditor the best security for the debt remaining unpaid.

In *Trullinger vs. Kofoed*, 7 Oregon 228, plaintiff furnished lumber and materials used in construction of building for which he claims lien. He also furnished lumber used in construction of sidewalks. Defendant paid him $141.00, which he applied in payment of the sidewalk lumber for which he had no lien.

The court said:

> "And in case neither party had made the application, then the court could make it; and, when the court does make such application, the payment will be first applied to unsecured debts."

Rule was reaffirmed in *Union Credit Assn. vs. Corson,* (Ore.) 149 Pac. 318.

Where a party indebted to another on more than one account makes a partial payment, the

burden of proving that, at or before the time of such payment he directed its application to a particular debt, as pleaded by him, and that this direction was made known to his creditor, is upon the debtor.

See

Stone Co. vs. Rich, 75 S. E. 1077 (N. C.).

The same rule, that the court will apply payments to the debt which has the most precarious security, has been followed in the following states and courts:

Missouri:—*Mich., etc., Ins. Co. vs. Rodger,* 191 S. W. 1066.

Federal:—*Sanborn vs. Stark,* 31 Fed. 18 (Colo.).

Federal:—*The D. B. Steelman,* 48 Fed. 580 (Va.).

Federal:—*The Katie O'Neil,* 65 Fed. 111 (Judge Morrow).

Pennsylvania:—*Johnson's Appeal,* 37 Pa. St. 268.

Kentucky:—*Bell & Co. vs. Glass Works,* 50 S. W. 1092.

Kentucky:—*Burke vs. Albert,* 20 Am. Dec. 209.

Minnesota:—*Gardner vs. Leck,* 54 N. W. 746.

Minnesota:—*Lash vs. Edgerton,* 13 Minn. 210.

New Hampshire:—*Smith vs. Lewiston Mill,* 34 Atl. 153.

Massachusetts:—*Parker vs. Green,* 49 Mass. 137.

THE BOARD OF THE MEN.

Some time after the Hills-Corbet Company had finished their work, after Tromble, manager of the Craig Lumber Company, had been discharged and a man named Shattuck had taken his place, and after the Lumber Company had ceased doing business, Mr. Humfreys, a bookkeeper for the Lumber Company, entered a charge against the Hills-Corbet Company in the sum of $3,324.00 to cover board of their men. This sum was arrived at by making a mere estimate of the number of days these men boarded—made not from the time books, but only from Cloudy's check stubs—and by making a second guess as to what the cost of boarding the men had been. No record was kept by the Craig Lumber Company of the meals furnished to Hills-Corbet Company men nor of the cost of the same. Humfreys was not even present during the period when Hills-Corbet men were on the ground and didn't know whether the charge was proper in amount or at all. It was simply his own bright idea, formed long after the transaction (See Transcript, pp. 225, 223).

The fact was that Tromble, manager of the Lumber Company, told Corbet and Cloudy that the Lumber Company would stand the expense of boarding the Hills-Corbet men (Transcript, pp. 192, 179). During the time work was going on, the Lumber Company kept no record of the cost of the board or the meals served (Transcript, p. 178). And this fact shows that the Lumber Company did not intend to charge the Hills-Corbet Company with any cost for boarding the men. While Tromble, the manager who signed the contract, was in charge, no record was kept and no charge made for board. It was not until new officers had taken charge, and until six months later, that the estimate made by the bookkeeper was entered on the books.

Counsel insists that the testimony of Corbet and Cloudy that the Lumber Company agreed to stand and assume the cost of the board is an attempt to vary the written contract. But the contract itself is silent as to the board. And the conversations and conduct of the parties is competent to show the construction and meaning which they themselves put upon the contract.

THE JUDGMENT AGAINST THE BANK.

The Bank of Alaska's rights under an alleged real estate mortgage were set up in the answer of

the trustee. Later the Bank entered its general appearance in the action and expressly agreed to be bound by the final judgment. Moreover, the Bank, by its attorney, signed a stipulation that judgment against it on the bond filed might be rendered by the trial court. The bond filed by Bank provided expressly that, if the United States District Court shall sustain the rights of Hills-Corbet Company, judgment may be entered by said court directly against the bond and the parties thereto for the amount found due Hills-Corbet Company. The Bank, through its attorney, John B. Marshall, appeared at and took part in the trial of the action, cross-examining the witnesses. It comes near to bad faith now to question the right of the court to render judgment against the Bank.

The purpose of the stipulation and the bond is apparent. It permitted a sale of the property in controversy pending final judgment. Instead of depositing the proceeds of the sale in court, a bond was filed, and the Bank permitted to keep the proceeds of the sale. The Bank has invited the judgment entered and can not now complain.

CONCLUSION.

We desire to suggest, in conclusion, that the findings of fact made by the court were the result

of a patient and careful examination of the testimony offered; they are based upon uncontradicted testimony of the representatives of Hills-Corbet Company. Neither the trustee nor the Bank offered any testimony upon the real issues of the case. Their only witness, Humfrey, a bookkeeper, knew nothing about the contract, the work done under it or payments made. Therefore, the findings of the court should carry great weight with this court and should not be set aside unless palpably erroneous. For all of the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

CASSIUS E. GATES,
FRANK P. HELSELL,
NEWARK L. BURTON,

Attorneys for Appellees.